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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK W. HOLBERT,

Defendant and Appellant.

2d Crim. No. B182182
(Super. Ct. No. 1134563)
(Santa Barbara County)

ORDER MODIFYING OPINION AND
DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed on August 29, 2006, be modified as follows:

1. On page 12, a new paragraph is added after the second full paragraph to read as follows:

Holbert's reliance on *People v. Burnett* (2004) 116 Cal.App.4th 257, 262 is misplaced. In *Burnett*, no section 290.3 fine was imposed and the court concluded that, on a silent record, a reviewing court should presume implied findings necessary to support the order. (*Id.*, at p. 261.) Here, a fine was imposed and, accordingly, we presume a finding consistent with imposition of the fine, namely, a finding of ability to pay. (*Ibid.*) In addition, the failure to impose a section 290.3 fine on a silent record does not result in an unauthorized sentence

because a trial court has discretion to do so if it finds the defendant unable to pay the fine. (*Ibid.*) But, in this case the trial court imposed a section 290.3 fine, but in an amount not authorized by the statute.

There is no change in the judgment.

Appellant's petition for rehearing is denied.